

ORDER NO. 1949

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman; and
Robert G. Taub

Competitive Product Prices
Priority Mail
Priority Mail Contract 73

Docket No. MC2014-11

Competitive Product Prices
Priority Mail Contract 73 (MC2014-11)
Negotiated Service Agreement

Docket No. CP2014-15

ORDER ADDING PRIORITY MAIL CONTRACT 73
TO THE COMPETITIVE PRODUCT LIST

(Issued January 9, 2014)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Priority Mail Contract 73 to the competitive product list.¹ For the reasons discussed below, the Commission approves the Request.

¹ Request of the United States Postal Service to Add Priority Mail Contract 73 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 19, 2013 (Request).

II. BACKGROUND

On December 19, 2013, in accordance with 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30 *et seq.*, the Postal Service filed the Request, along with supporting documents. In the Request, the Postal Service asserts that Priority Mail Contract 73 is a competitive product that establishes rates “not of general applicability” within the meaning of 39 U.S.C. § 3632(b)(3). Request at 1. Among the supporting documents, the Postal Service included a copy of Governors’ Decision No. 11-6,² a contract related to the proposed new product, requested changes to the competitive product list, a statement supporting the Request, and a certification of compliance with 39 U.S.C. § 3633(a). In addition, the Postal Service submitted an application for non-public treatment of materials to maintain redacted portions of Governors’ Decision No. 11-6, the contract, customer-identifying information, and related financial information filed under seal. Request, Attachment F.³

On December 20, 2013, the Commission issued an order establishing the two dockets, appointing a Public Representative, providing interested persons with an opportunity to comment, and requesting supplemental information concerning the contract’s price adjustment mechanism.⁴

The Postal Service responded to the request for supplemental information on December 30, 2013, clarifying that prices under the contract are intended to be adjusted

² Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Domestic Competitive Agreements, Outbound International Competitive Agreements, Inbound International Competitive Agreements, and Other Non-Published Competitive Rates, March 22, 2011 (Governors’ Decision No. 11-6).

³ In its application for non-public treatment of materials, the Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7. The Commission has consistently denied similar requests for indefinite protection. See, e.g., Order No. 563, Docket Nos. MC2011-1 and CP2011-2, Order Approving Priority Mail Express Contract 9 Negotiated Service Agreement, October 20, 2010, at 6-7.

⁴ Order No. 1918, Notice and Order Concerning the Addition of Priority Mail Contract 73 to the Competitive Product List, December 20, 2013.

annually.⁵ The Postal Service specifies that the “prices will be adjusted on February 1, 2015.” *Id.* at 2.

III. COMMENTS

The Public Representative filed public (redacted) and non-public versions of her comments and supporting financial workpapers on January 2, 2014.⁶ On January 3, 2014, the Public Representative filed a supplemental clarifying addendum to the earlier non-public financial model.⁷ No other interested person submitted comments.

The Public Representative argues that the terms of the contract “allow for possible large variation in the customer experience as it relates to actual costs, sufficient enough for revenue not to cover costs.” PR Comments at 2. She bases this argument on the potential for variation in packaging shape and dimensions under the terms of the contract, which would affect the costs incurred by the Postal Service under the contract. The Public Representative concludes that the Postal Service has not “demonstrated with sufficient certainty” that the contract will comply with 39 U.S.C. 3633(a). *Id.* She concludes that Priority Mail Contract 73 should not be added to the competitive product list “until contract terms are worded with more certainty.” *Id.* at 4.

⁵ Response of the United States Postal Service to Request for Supplemental Information, December 27, 2013 (Postal Service Response). The Postal Service response was accompanied by a Motion of the United States Postal Service for Late Acceptance of Response to Request for Supplemental Information, December 30, 2013. That motion is granted.

⁶ Public Representative Comments on Postal Service Request to Add Priority Mail Contract 73 to Competitive Product List, January 2, 2014 (PR Comments); Notice of the Public Representative of Filing of Materials Under Seal, January 2, 2014. The PR Comments were preceded by a Motion of the Public Representative for Late Acceptance of Comments, December 30, 2013. That motion is granted.

⁷ See Notice of the Public Representative of Filing of Materials Under Seal, January 3, 2014. The notice was accompanied by a Motion of the Public Representative for Leave to Supplement Nonpublic Financial Model File, January 3, 2014. That motion is granted.

IV. COMMISSION ANALYSIS

The Commission has reviewed the Request, the instant contract, the supporting data filed under seal, and the Public Representative's comments.

Product list requirements. The Commission's statutory responsibilities when evaluating the Request include assigning Priority Mail Contract 73 to either the market dominant or competitive product list. See 39 U.S.C. § 3642(b)(1); 39 C.F.R. § 3020.34. In addition, the Commission must consider the availability and nature of private sector enterprises engaged in delivering the product, the views of those who use the product, and the likely impact on small business concerns. See 39 U.S.C. § 3642(b)(3); 39 C.F.R. §§ 3020.32(f), (g), and (h).

The Postal Service asserts that it provides Priority Mail service in a highly competitive market, that other shippers who provide similar services constrain its bargaining position, and that it can therefore neither raise prices nor decrease service, quality, or output without risking the loss of business to competitors. Request, Attachment D at 2. The Postal Service states that the contract partner supports the Request, that expedited shipping is widely available from private firms, and that the Postal Service is unaware of any small business concerns that could offer comparable services to the contract partner. *Id.* at 3.

The Commission agrees that the priority market is highly competitive and thus prevents the Postal Service from significantly increasing rates or degrading service without potentially losing volume. This is borne out by the availability of other providers. Further, there is no evidence of an adverse impact on small businesses. For these reasons, having considered the relevant statutory and regulatory requirements and the Postal Service's supporting justification, the Commission finds that Priority Mail Contract 73 is appropriately classified as competitive and is added to the competitive product list.

Cost considerations. Because Priority Mail Contract 73 is a competitive product, the Postal Service must also show that the contract covers its attributable costs, contributes to the Postal Service's institutional costs, and does not cause any market

dominant products to subsidize competitive products. 39 U.S.C. § 3633(a); 39 C.F.R. § 3015.5.

As part of its Request, the Postal Service submitted a certified statement that the contract complies with the requirements of 39 U.S.C. § 3633(a). Request, Attachment E. In addition, the Postal Service filed supporting revenue and cost data showing that the contract is expected to cover its costs.

The Public Representative is concerned that the terms of the contract are insufficiently specific to ensure that the contract covers its costs. PR Comments at 2. In particular, she is concerned that the customer may send irregularly-shaped parcels or parcels that are larger or weigh more than the Postal Service estimates, which could prevent the contract from covering its costs. *Id.* at 2-3. Although such an outcome is possible under the terms of the contract, the Commission finds that it is unlikely. The contract establishes a maximum weight for contract packages. Request, Attachment B at 1. The Postal Service's financial workpapers include a projected size (expressed in cubic feet) for the contract packages. Even if the actual size of contract packages differs from projections, the contract is still likely to cover costs. For example, even if each contract package is double the number of cubic feet projected by the Postal Service, the contract will still meet the requirements of 39 U.S.C. 3633(a). If the contract partner sends contract packages that have a size, shape, or weight that is significantly greater than that projected by the Postal Service, such that the contract cannot cover its costs, the terms of the contract allow the Postal Service to terminate the contract with 90 days written notice.

The Public Representative is also concerned that "a minimum volume requirement value for the first contract year is not explicit, and the actual rate for the second contract year for the lowest volume minimum requirement tier is not shown." *Id.* at 3. She argues that the "specific volume requirement should be specified in the contract terms for the first year contract period, and the specific price should be shown for the minimum volume requirement tier of the second contract year. *Id.* The Public

Representative is correct that the contract does not establish a minimum volume requirement for the first contract year, but the absence of a minimum volume requirement for the first year does not prevent the contract from covering its costs in the first year. The projected unit revenue for the first contract year exceeds the projected unit attributable cost for the contract, regardless of the volume of contract packages. For the second year of the contract, although the table in section I.H.2. does not specify the prices for a certain range of potential volumes, the contract can be read to provide that the second-year prices will be the same as the first year prices outlined in section I.H.1. or the published, non-discounted prices described in section I.B. of the contract. In either case, the contract is likely to cover its costs for the second year.

The projected unit revenue at either price exceeds the unit attributable cost for the contract packages, regardless of the volume of contract packages. Consequently, neither the absence of a minimum volume requirement for the first year of the contract nor the lack of specificity about the price for a certain range of volumes for the second year of the contract affects the contract's ability to meet the requirements of section 3633(a).

Should the size, shape, volume, or weight of the contract packages deviate from the Postal Service's projections, either party may terminate the contract with 90 days written notice. Additionally, as part of its Annual Compliance Determination proceedings, the Commission will review the contract's financial performance for consistency with section 3633(a).

Other considerations. The Public Representative cites section I.F. of the contract as an example of a contract term that should be "worded with more certainty." PR Comments at 4, n.15. In response to the Commission's request for supplemental information the Postal Service clarified this section of the contract, specifying that the contract rates would be adjusted on an annual basis. Postal Service Response at 2.

The contract is scheduled to take effect January 10, 2014. Request, Attachment B at 3. The contract is scheduled to expire 2 years after the effective date, unless,

among other things, either party terminates the contract with 90 days' written notice to the other party or it is renewed by mutual agreement.⁸

The contract also contains a provision that allows the parties to extend the contract for two 90-day periods if a successor agreement is being prepared and the Commission is notified within 7 days of the contract expiring.⁹ During the extension periods, prices will be adjusted as described in the contract. Request, Attachment B at 3. The Commission finds the two potential 90-day extension periods are reasonable because: (1) prices are automatically adjusted in the extension period, making it likely that the contract will continue to cover its attributable costs; and (2) the extension(s) should assist the Postal Service's contract negotiations by providing additional flexibility.

If the instant contract is terminated prior to the scheduled expiration date, the Postal Service shall promptly notify the Commission.

Within 30 days after the instant contract terminates, the Postal Service shall file the annual (contract year) costs, volumes, and revenues disaggregated by weight and zone associated with the contract.

In conclusion, the Commission approves Priority Mail Contract 73 as a new product. The revision to the competitive product list appears below the signature of this Order and is effective immediately.

⁸ Request, Attachment B at 4. Should both parties agree to renew the contract, any such renewal is required to follow the requirements of 39 U.S.C. § 3633 and the Commission's implementing regulations of 39 C.F.R. part 3015.

⁹ *Id.* at 4. As the Commission noted in Order No. 1773, the Postal Service clarified that identical language in Priority Mail Contract 60 contemplates the Postal Service filing any notices of extension with the Commission *at least one week prior to* the expiration of the contract, as opposed to the instant contract's "within seven (7) days of the contract expiring." See Docket Nos. MC2013-54 and CP2013-70, Order No. 1773, Order Adding Priority Mail Contract 60 to the Competitive Product List, July 8, 2013, at 3; see *also* Docket Nos. MC2013-54 and CP2013-70, Response of the United States Postal Service to Chairman's Information Request No. 1, July 1, 2013, question 2.

V. ORDERING PARAGRAPHS

It is ordered:

1. Priority Mail Contract 73 (MC2014-11 and CP2014-15) is added to the competitive product list as a new product under Negotiated Service Agreements, Domestic. The revision to the competitive product list appears below the signature of this Order and is effective immediately.
2. The Postal Service shall notify the Commission if the instant contract terminates prior to the scheduled expiration date as discussed in this Order.
3. Within 30 days after the instant contract terminates, the Postal Service shall file the annual (contract year) costs, volumes, and revenues disaggregated by weight and zone associated with the contract.
4. The Secretary shall arrange for publication in the *Federal Register* of an updated product list reflecting the change made in this Order.

By the Commission.

Ruth Ann Abrams
Acting Secretary

CHANGE IN MAIL CLASSIFICATION SCHEDULE
CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified in Appendix A to 39 C.F.R. part 3020, subpart A—Mail Classification Schedule. These changes reflect the Commission's order in Docket Nos. MC2014-11 and CP2014-15. The Commission uses two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

Part B—Competitive Products

2000 Competitive Product List

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Negotiated Service Agreements

Domestic

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Priority Mail Contract 73

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